IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No.

SOUTHGATE BROKERAGE COMPANY, INC.,
Petitioner,

vs.

FEDERAL TRADE COMMISSION,
Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I

The Opinions Below

The findings as to the facts and conclusion, and the order of the Federal Trade Commission, were adopted on September 12, 1944, Docket No. 4821, and appear at pages 40 to 46, inclusive, of the record.

The opinion of the United States Circuit Court of Appeals for the Fourth Circuit is reported in 150 Fed (2d) 607, under the title *Southgate Brokerage Co., Inc.*, v. *Federal Trade Commission.* It also appears in the record at pages 99 to 107, inclusive.

II

Jurisdiction

1. The jurisdiction of this Honorable Court is invoked under section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925 (43 Stat. 938, c. 229, sec. 1; Title 28, U. S. C. A., sec. 347(a)), and section 11 of the Clayton Act (38 Stat. 734; Title 15, U. S. C. A., sec. 21).

2. The judgment of the United States Circuit Court of Appeals to be reviewed was entered on July 19, 1945 (R. 107).

III

Statement of the Case

A summary statement of the pertinent facts is given in the petition at pages 2 to 5, above, and in the interest of brevity is not repeated here.

IV

Specification of Errors to be Urged

The Circuit Court of Appeals erred:

1. In sustaining an order of the Federal Trade Commission which lacks the basic and essential findings of fact to support it.

2. In sustaining an order of said Commission based upon a proceeding wherein petitioner was denied a full and fair hearing.

3. In holding that petitioner is in violation of subsection (c) of Section 2 of the Clayton Act, as amended by the Robinson-Patman Anti-Discrimination Act (49 Stat. 1526; 15 U. S. C. A., sec. 13(c)).

4. In holding that petitioner did not have the right to receive the compensation involved herein under subsection

(d) of Section 2 of said Act (49 Stat. 1526; 15 U. S. C. A., sec. 13(d)).

V

ARGUMENT

Summary of the Argument

Point A. The order of the Federal Trade Commission is fatally defective in that the Commission made no finding whatsoever as to whether services *were or were not* rendered by petitioner—the findings, conclusion and order being entirely silent as to this essential statutory point. This is directly contrary to the rule established by applicable decisions of this Court.

Point B. Petitioner was denied the opportunity to show the true nature of the services rendered and of the compensation received therefor. It was, likewise, denied the opportunity to show that the prices at which it bought and the compensation which it received were available on proportionally equal terms to all who compete with it in the distribution of the commodities. This denial prevented petitioner from receiving the fair hearing to which it was entitled by the statute and the applicable decisions of this Court.

Point C. Subsection 2(c) of the Robinson-Patman Anti-Discrimination Act does not prohibit receipt of compensation for bona fide services actually rendered to sellers, but specifically excepts same from its prohibitions.

Point D. Subsection 2(d) of the said Act expressly deals with services or facilities rendered by a customer to sellers, and permits compensation therefor when same is, as here, available on proportionally equal terms to all who compete with such customer in the distribution of the commodities.

Point A

The Commission's Order is Fatally Defective in That It Failed to Find Either That Services Were or Were Not Rendered Under Subsection 2(c).

The Commission failed to find either that services *were or were not* rendered by petitioner. With subsection (c) containing a positive exception permitting the payment of compensation where services are rendered to the seller (*infra*, p. 20; with the answer affirmatively alleging that such services were rendered by petitioner (R. 11), and this allegation being nowhere denied, we respectfully submit that it was indispensable to the validity of the Commission's order, that the Commission affirmatively find that no such services were rendered by petitioner.

This Court has repeatedly held that orders of administrative tribunals must be supported by findings of the basic and essential facts needed to support its conclusions. We quote below from page 480 of this Court's decision in *Morgan* v. *United States*, 298, U. S. 468, decided in 1924, and frequently cited with approval by the Court in later decisions:

> "There must be evidence adequate to support pertinent and necessary findings of fact. * * * Facts and circumstances which ought to be considered must not be excluded. * * * *Findings based on the evidence must embrace the basic facts* which are needed to sustain the order." (Citing numerous cases.) (Italics added.)

Again in *Mahler* v. *Eby*, 264 U. S. 32, at pages 43, 45, the Court said:

> "There is no authority given to the Secretary to deport except upon his finding, after a hearing, that the petitioners were undesirable residents. * * *

> The warrant *lacks the finding required by the statute* and such a fundamental defect we should notice. It goes to the existence of the power on which the proceeding rests" (Italics added.)

And in *Wichita Railroad and Light Company* v. *P. U. Comm.*, 260 U. S. 48, at page 59, this Court held:

> "When therefore, such an administrative agency is required, as a condition precedent to an order, to make a finding of facts, *the validity of the order must rest upon the needed finding.* * * *
>
> "It is pressed on us that the lack of an express finding may be supplied by implication and by reference to the averments of the petition invoking the action of the Commission. We cannot agree to this." (Italics added).

See also *Steam Tug E. A. Packer* v. *New Jersey Lighterage Company*, 140 U. S. 360, at page 365, wherein this Court, speaking of the rule in judicial proceedings, held:

> "The rule is general, that wherever the trial court finds the facts and conclusions of law therefrom, *it is bound to find every fact material to its conclusion*, and a refusal to do so, if properly excepted to, is ground for reversal" (Italics added).

See also other cases cited on page 6 of the petition herein.

We respectfully submit that the failure of the Commission to make findings on the matters herein specified is fatal to the legality of the order in question.

Point B

Denying Petitioner the Right to Prove the Services It Rendered Sellers, the True Nature of the Compensation Received Therefor, and That the Payments Were Not Discriminatory, Prevented It From Receiving a Fair Hearing

Petitioner offered to prove that during the entire 50 years of its existence it has been consistently recognized as a merchandising broker, and that the term "brokerage" as used in its business covered compensation for services rendered in receiving and breaking cars, warehousing, handling, advertising, promoting the sale of, selling, invoicing, collecting, etc., for the products which it was distributing under this method for the packer.

The services which petitioner renders in respect to such goods are obviously greater and more costly than those rendered in respect of much of the goods to which it does not take title, the compensation on which is not questioned here. But with regard to the merchandise in either category, petitioner performs the same basic function and service so far as the packer is concerned—selling and distributing the packer's produce to the wholesale trade.

Petitioner, however, was denied the opportunity to show any of this, either the true nature of the compensation it received, the bona fide services which it actually rendered therefor at the request of its principals, or that the same prices and compensation were available on proportionally equal terms to all who competed with it in the distribution of the commodities.

This evidence, petitioner strongly maintains, was highly material to the issues herein, and denying its admission completely and effectively prevented petitioner from showing cause why the order should not be entered against it by the Commission. The action of the Commission and

the court below, we respectfully submit, prevented petitioner from receiving the full and fair hearing contemplated by the statute and provided by the unbroken line of decisions of this Honorable Court.

In *I. C. C.* v. *Louisville & Nashville R. R.*, 227 U. S. 88, at page 91, this Court held:

> "But the statute gave the right to a full hearing, and that conferred the privilege of introducing testimony, and at the same time imposed the duty of deciding in accordance with the facts proved."

Again, in *B. & O. R. R. Co.* v. *United States*, ("The Chicago Junction Case") 264 U. S. 258, at page 265, the Court stated:

> "The provision for a hearing implies both the privilege of introducing evidence and the duty of deciding in accordance therewith."

And, in *Opp Cotton Mills, Inc.* v. *Administrator*, 312 U. S. 126, at page 155, the Court held:

> "* * * it has long been settled that the technical rules for the exclusion of evidence applicable in jury trials do not apply to proceedings before federal administrative agencies."

Also, see other cases cited on page 7 of the petition herein.

In view of the foregoing, we respectfully submit that petitioner has been denied its lawful right to a full and fair hearing.

POINT C

Subsection 2(c) of the Robinson-Patman Act Does Not Prohibit Receipt of the Compensation Involved Here

The plain, certain and unambiguous language of subsection 2(c) of the Robinson-Patman Act permits the payment and receipt of compensation, *if services are rendered*

therefor. To construe it otherwise is to render the exception nugatory. The construction given by the court below constitutes a grave error of law in holding in effect that under no circumstances can a seller pay brokerage or other compensation where the other party to the transaction takes title to the commodity, irrespective of the purpose for which this may be done. That construction would obviously be the effect of the section, if it had been enacted *without the express exception provided for in case of services rendered.*

But, the proffered evidence, which petitioner was denied the right to produce, showed that it has always been regarded both by its principals and its customers as representing the sellers in the capacity of an independent broker (R. 93, 95-6). It showed, further, that the compensation petitioner received from its principals was for bona fide *services actually rendered* as an intermediary in the distribution process, and exactly what those services and compensation covered (R. 88). It also showed why it was necessary, as part of its complete brokerage service, for petitioners on occasions to take title to part of the commodities which it distributed for its principals (R. 88, 90-2). These facts clearly and, we submit, effectively, distinguish the instant case from *Great Atlantic & Pacific Tea Co.* v. *F. T. C.*, 106 Fed. (2d) 667, and other like cases, cited and relied upon by the court below.

Petitioner, in brief, was denied the opportunity of showing how and why it came directly within the clearly expressed exception to the prohibitions of subsection 2(c). The court below has taken the position that regardless of petitioner's real functions, inasmuch as it buys certain goods, it is denied the right to compensation, because as a "buyer" it cannot as a matter of fact or of law, render services to the seller. Manifestly, if petitioner is deemed not to have rendered any service in connection with com-

modities to which it takes title, it cannot be because of any *fact;* it is solely because of a construction of the *law,* which petitioner, respectfully submits, subsection 2(d) of the Act clearly shows to be erroneous.

Point D

Subsection 2(d) Clearly Recognizes That It Is Possible for a Buyer To Furnish Services To a Seller, and Governs If Petitioner Is Held To Be a Buyer.

If the rendition of services by a buyer to a seller is held to be a legal impossibility, then subsection 2(d) of the Act in question becomes entirely a nullity, for it permits that very thing to be done, provided the compensation therefor is available on proportionally equal terms to all other competing customers of the seller. But it is a well recognized canon of statutory construction that different sections of a statute should be construed so as to harmonize with each other, rather than so as to make them stand in conflict.

Although petitioner denies that by taking title as part of its distributive function, it is disqualified as an intermediary to receive compensation under subsection 2(c), even if this were the case, subsection 2(d) permits it to be compensated by the seller. That subsection expressly provides in the clearest of terms that a buyer *can* furnish services to a seller in the "handling, sale, or offering for sale" of the products being distributed.

The sole provision of section 2(d) qualifying the payment of compensation to petitioner is that same shall be available on proportionally equal terms to all who perform the same function and compete with it in the distribution of the products. As to this, the law is crystal clear. But petitioner has been denied the opportunity to show the basic facts that the services were performed in the "handling, sale or offering for sale," and that the compensation was

available on proportionally equal terms to its competitors.

These facts as to the non-discriminatory character of the compensation received—that it was available on proportionally equal terms to all other customers who competed with petitioner in the distributive function—further, and most effectively, distinguish the instant case from *Great Atlantic & Pacific Tea Co.* v. *F. T. C., supra,* and the others relied upon by the Circuit Court of Appeals. For obvious reasons, the buyers there were neither concerned with, nor interested in, compensation of a non-discriminatory nature.

Furthermore, it will be noted that the decisions of the Commission, itself, clearly recognize that the payment of compensation to a customer for carrying warehouse stocks for spot distribution, and furnishing promotional and selling services and facilities, is not prohibited when such compensation is made available on proportionally equal terms to all who are competitors of such customer.

Lambert Pharmacal Co., 31 F. T. C. 734;
American Crayon Co., 32 F. T. C. 306;
Binney & Smith Co., 32 F. T. C. 315.

Petitioner should not be deprived of the benefit of subsection 2(d) simply because the complaint was issued under subsection 2(c), and there is not the slightest justification for construing this Act so that under one provision a practice is approved and under another is condemned. We respectfully submit that there is no conflict between the sections, but if there were one, under the law petitioner is entitled to an interpretation that would be most favorable to it.

Conclusion

The decision below involves a question of federal law which has never been passed upon by this Court, and one of vital importance to those engaged in the production

and distribution of food. If petitioner's view is correct, said decision involves a grave error in the construction of this federal law, which is of wide application, and is in direct conflict with an unbroken line of decisions of this Court with reference to the fundamental requirements of findings of fact by administrative tribunals, and the granting of a full and fair hearing in such proceedings.

For the reasons herein set forth, we respectfully submit, the decision should be reviewed by this Court and a writ of certiorari should issue for that purpose as prayed in the foregoing petition.

Respectfully submitted,

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